The Hungarian “Lex NGO” before the CJEU: Calling an Abuse of State Power by its Name

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On 14 January 2020, Advocate General Campos Sánchez-Bordona delivered his Opinion in Case C-78/18 on the restrictions incorporated into a 2017 Hungarian law on the financing of NGOs from abroad. He makes clear that Hungary’s “Lex NGO” not only restricts the free movement of capital but also violates several fundamental rights, and is therefore incompatible with EU law.

Lex NGO

The contested law stigmatizing NGOs (Lex NGO) was adopted in the middle of June 2017 (Act LXXVI of 2017 on the transparency of foreign funded organisations adopted on 13 June 2017). Even though under the respective rules in force since 2011, stringent rules applied to civil society organisations, obliging them to submit very detailed annual financial and narrative reports to the court, the alleged objective of the law was to ensure greater transparency of civil organizations that receive donations from foreign entities above a certain amount.

A number of obligations were imposed on affected NGOs. First, any association or foundation receiving foreign support above the amount of 7.2 million HUF per year (or according to the most recent modifications 9 million HUF – depending on the point in time discussed and the exchange rate approximately 21,500-23,500 EUR per year) was supposed to register with the Hungarian authorities as ‘organisations in receipt of support from abroad’. When registering, covered entities were also obliged to indicate donors’ name when their support reached or exceeded 500,000 HUF (approximately 1,500 EUR) and had to give the exact amount of the support. A database of foreign funded NGOs has been created and published on a free, publicly accessible electronic platform. Second, they had to indicate on their websites and in their publications that they are an ‘organisation in receipt of support from abroad’.

The alleged threat to national security

Lex NGO was certainly not the first attack against civil society. Harassment dates back to 2014 when Hungarian organizations getting money from the EEA/Norway NGO Grants Fund were intimidated through police raids, investigations carried out by the Government Control Office and suspension of tax numbers. Raids on NGOs were later found illegal by the Central Buda District court, but the government successfully planted the seeds of hostility against civil society. With Lex NGO, in

essence labelling civil society organizations and their representatives as foreign agents working against Hungarian interests, the attacks rose to a whole new level.

The claim that NGOs are a threat to national security is reflected, first, in the Preamble of the law (an unofficial English translation by the Hungarian Helsinki Committee is available here). Second, the explanations attached to the bill on civil society organisations refer to the protection of national security among the objectives of the law. And finally, the way the threshold for registration is determined links NGOs with terrorism: the sum is twice the amount determined by Article 6(1)(b) of Act LIII of 2017 on Anti-Money-Laundering and Financing of Terrorism. This is getting very close to demonizing dissenters as terrorists and indeed the government claims that NGOs receiving foreign support are helping asylum seekers, and among them terrorists, to enter the country.

The allegation on the ties to terrorism was reinforced, when a parliamentary committee on national security conducted a deliberation on NGOs receiving money from Soros funds. The committee's report was classified as state secret until 2037, therefore it was impossible to challenge the claims, while the threat of terrorism and terrorist activities was successfully linked to NGOs in the minds of the voters. In a public consultation in the fall of 2017 on the so-called 'Soros plan', the government specifically named the Hungarian Helsinki Committee (HHC), and alleged that the NGO is complicit in illegal migration. The HHC in the meantime won a legal suit after having proven in court that the claims were nonsensical. A new low was reached when an amendment to the Criminal Code introduced by the so-called "Stop Soros" legislative package was adopted which criminalized humanitarian assistance (see Hungarian Criminal Code, Article 353/A on the support and promotion of illegal immigration). To make matters worse, the provision – in sharp contrast to the Venice Commission's recommendations – was upheld by the Hungarian Constitutional Court (HCC).

Reactions to the law and legal challenges

Even before adopting Lex NGO, European Parliament Resolution of 17 May 2017 on the situation in Hungary called upon Hungary to withdraw the draft (Bill T/14967). Both then First Vice President of the Commission and the EU Fundamental Rights Agency foresaw that the draft was incompatible with EU law. In the Council of Europe setting, the Commissioner for Human Rights condemned the law's effect shrinking the space for civil society organisations, and in a letter addressed to the Speaker of the Hungarian Parliament urged the lawmaker to reject the bill. Even though the Parliamentary Assembly of the Council of Europe requested the government to suspend the parliamentary debate on the bill, while the opinion of the Venice Commission was pending, and to later incorporate its findings, the drafters failed to meaningfully respond to the European criticism, especially the preliminary opinion of the Venice Commission. Adoption of Lex NGO was listed as one of the government's mischiefs in the European Parliament's resolution triggering an Article 7(1) TEU proceeding against Hungary as proof that in Hungary there was a systemic threat and a clear risk of a serious breach of the values of Article 2 TEU.

The law was attacked before the HCC, but the constitutional court – already captured – found a way to avoid confrontation. In order to save face, the HCC offered an interesting reason to justify its lack of action: the court decided to stay the proceedings (and also the proceedings concerning Lex CEU) before it in the name of "European constitutional dialogue". Whereas this justification may sound as persuasive and Europe-friendly, in reality it is a fake argument, an abuse of a legal concept, so as on the one hand, to avoid deciding the case on the merits, and on the other to grant more time to the government to harass and intimidate NGOs (and with regard to Lex CEU, to force the Central European University out of the country). As noted by Gábor Halmai on this blog, the HCC always uses legal concepts and attaches to them an interpretation that pleases the government most.

On 14 July 2017, the European Commission sent a letter of formal notice to Hungary concerning the law on foreign-funded NGOs. The European Commission concluded that Lex NGO introduces unjustified and disproportionate restrictions to the free movement of capital enshrined in Article 63 TFEU; and raises concerns regarding a number of fundamental rights, notably the rights to respect for private life, to protection of personal data, and to freedom of association as protected by Articles 7, 8 and 12 of the Charter of Fundamental Rights. Hungary got a one-month-deadline to respond to these allegations, a requested extension for the reply was not granted by the Commission. Hungary replied by letters of 14 August 2017 and 7 September 2017, disputing the criticism. The government insisted that civil groups remained free to secure funding from any source they choose. The law, in the government's view, only ensures the transparent flow of money in the civil sector. Since the Commission was dissatisfied with this response, it issued a reasoned opinion on 5 October 2017. A request for extending the one-month-deadline was again not granted and on 5 December the government denied all allegations by the Commission. On 7 December 2017, the Commission took the case to the CJEU. It is of less practical, but important symbolic relevance that Sweden – in line with its foreign policy prioritising the rule of law – intervened in support of the Commission. A hearing was held on 22 October 2019.

The AG Opinion in Case C-78/18

Advocate General Campos Sánchez-Bordona in his Opinion first addressed Hungary's claim that the action was inadmissible on the ground that Hungary was not given sufficient time to respond to the Commission. Hungary challenged refusal of expanding the deadline as a breach of sincere cooperation, the right to good administration, the right to be heard and the rights of the defense. The AG held that all circumstances of the case have to be taken into account, but ultimately the decisive question is whether the Member State subject to an infringement action had sufficient time to prepare its defense. Whereas the one-month-deadline was shorter than the usual period of two months granted to respondent states, *de facto* Hungary also had two months to respond. Contrary to Hungary's challenge, the fact that the Commission decided to take the case to the CJEU only two days after it got Hungary's response, is irrelevant from the viewpoint of admissibility. Although this sounds as a technical matter of lesser importance, it might have huge implications. It seems the Commission finally realized that time is on the

side of those who violate the rule of law. While Member States under review should be able to present their arguments, it makes no sense to prolong the dialogue with a party that acts in bad faith abusing legal concepts and hiding its real objective to dismantle the rule of law behind oxymorons such as illiberal democracy and authoritarian constitutionalism. As I argued in my previous post, it was high time for the Commission to "acknowledge that further dialogue will only result in granting sufficient time to complete the capture of state institutions and solidifying an authoritarian state structure".

When establishing the actual test for assessing Lex NGO, the Opinion held that restrictions on civil society organizations that receive foreign funds infringe the principle of free movement of capital and a number of fundamental rights, and these matters must be considered jointly, following an integrated approach [49, 81]. Since the entry into force of the Lisbon Treaty and simultaneously the EU Charter of Fundamental Rights, traditional freedoms must be interpreted and, if needed, *redefined* in light of Charter rights [85, emphasis in original at 92]. It needs to be assessed on a case by case basis whether fundamental rights are affected or not. If not, the traditional test applies, and judges have to look into necessity, appropriateness and proportionality of the interference [95]. If, however, limitation of the freedoms is "the primary and direct cause of the infringement of a fundamental right", the judicial test must be the same that is applicable to the fundamental right concerned [97]. In such cases, where fundamental rights are at the core of the matter, the traditional criteria will still be operationalized, but the stringency of assessing the necessity, appropriateness and proportionality will be qualified [100].

Once having framed the issue as one of free movement of capital, the Opinion listed the conditions laid down in the disputed NGO law that limited that freedom. One such requirement is the registration of NGOs as 'organisation in receipt of support from abroad' and the publication of certain data. Since these conditions apply solely in the case of donations coming from abroad, they are more likely to affect nationals of other Member States than Hungarians [111].

Foreign donors might be discouraged from making donations, since they might not want to have their identity disclosed in an open access database. This may indirectly limit their freedom of association as guaranteed by the EU Charter of Fundamental Rights. Rules on foreign donors also violate their right to protection of private life and personal data, also protected by the Charter of Fundamental Rights. This requirement in Hungarian law not only helps to identify donors, but also their ideological affinity, for which they might be stigmatized in Hungary [134-136]. Surprisingly for anyone with a law degree and beyond, the Hungarian government argues that names are no personal data, by invoking Court of Justice jurisprudence in an abusive manner [130]. But the Advocate General does not fall for it and states the obvious: publishing natural persons' names and the amount of donation in a publicly available register, is an interference in the private life of the persons concerned as regards the processing of their data [131-134].

Not only the data protection concern, but also the stigmatizing effect of the labeling requirement results in a "cloud of suspicion [that] hangs over donors, which is sufficient to dissuade some, or many, from contributing" [123].

When criticizing the disputed provisions, the opinion also invokes the concept of European citizenship, when it holds that “EU citizens have a qualified interest in participation in the economic, social and cultural life of the Member States as a whole […] turning the ideal of ‘an ever closer union’ into reality” [124].

These are all valid concerns, and per se a violation of EU law, but until this point the reason does not touch upon the genuine objectives of the Hungarian lawmaker and the effect of the law, i.e. the silencing of NGOs and preventing them from exercising government criticism. But this is the point when the Charter – the infamously called paper tiger – acquires teeth and enables the Advocate General to call a spade a spade, i.e. an abuse of state power by its name.

Apart from foreign donors, Hungarian NGOs may also be affected. They may run into financial difficulties as a result of the law discouraging foreigners to contribute to their budgets, and, as a consequence, their right to freedom of association, in fact their “viability and the survival of the organizations” might be jeopardized, which again may prevent them from achieving their social objectives [120].

Therefore, the requirements of Lex NGO amount to a restriction of the principle of free movement of capital, and a number of Charter rights, affecting both Hungarian NGOs and foreign donors.

The Opinion acknowledges that the rights mentioned can be limited, and state interests pointed out by Hungary – such as public policy, the fight against money laundering and terrorist financing – may justify rights limitations [137 ff.]. However, these legitimate aims do not make legislation permissible that imposes *ex ante* restrictions indiscriminately on all NGOs receiving foreign funds above a certain amount. The Opinion also underlines that EU laws on the fight against money laundering and against terrorist financing – as opposed to the Hungarian government’s claim – are sufficient guarantees [146]. But even if the Hungarian government pointed at legitimate state objectives, first, the law is too narrow by not covering all associations, such as sports clubs and religious entities, and neither does it cover commercial companies which also perform a decisive role in the formation of public opinion; second, there is no evidence presented how the infringement of rights serves the purpose; and third, the measures are disproportionate. Disproportionality can be traced in the fact that the 500,000 HUF threshold is excessively low; that all donations from abroad – including those from EU Member States – are treated indiscriminately as suspicious; that the law has a stigmatizing effect which may result in a material burden on NGOs; and that the law is disproportionate in terms of sanctions, which include the winding up of the organisation if Lex NGO is not complied with [125, 149-151, 158-161].

For the above reasons, the Advocate General concludes that the Hungarian law at issue unduly restricts the free movement of capital, the rights of respect for private life, protection of personal data and freedom of association.

Needless to say, Advocate Generals' opinions are not binding, but highly persuasive. Given the gravity of Lex NGO on both EU law and EU human rights law; the Hungarian government’s total denial of violations; their unwillingness to enter into a

meaningful debate with the Commission and change their official position, there is no reason for the Court of Justice of the EU not to follow Advocate General Campos Sánchez-Bordona's assessment.
